UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VJOCA SELMANOVIC, GRACIELA DASILVA and ROBIN MAX MORRIS,

Plaintiffs,

-against-

06 Civ. 3046 (DAB)
MEMORANDUM & ORDER

NYSE GROUP, INC., now the owner of the entity previously known as the NEW YORK STOCK EXCHANGE, INC., BUILDING MAINTENANCE SERVICES, LLC, and DOE CORPORATIONS 1-5,

Defendants.

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DEBORAH A. BATTS, United States District Judge.

On April 26, 2007 Plaintiffs Vjoca Selmanovic

resolve her claims at arbitration pursuant to a collective bargaining agreement negotiated by her union and urges the Court not to exercise supplemental jurisdiction over Selmanovic's claims against it. For the reasons set forth, BMS' motions are DENIED in their entirety.

I. BACKGROUND

In a Memorandum and Order dated March 28, 2007, the Court dismissed Selmanovic's Title VII claims against BMS upon finding that they were untimely filed and that no equitable tolling was warranted. The Court also found that Selmanovic's claims against

BMS responded to the Amended Complaint with the instant motions.[1]

According to the Amended Complaint, Selmanovic was on the payroll of BMS since August 1997, but "worked as a porter solely and entirely for the NYSE." (Id. ¶ 12.) Selmanovic alleges that "[t]he two companies, the NYSE and BMS, existed in a dual employment relationship regarding persons on the BMS payroll such as Selmanovic who were assigned to and who did work in the NYSE's facilities." (Id. ¶ 14.) She alleges that she was subjected to a pattern of egregious sexual harassment by her NYSE supervisor. (Id. ¶¶ 16-19.) Selmanovic, along with co-Plaintiff DaSilva, also a victim of sexual harassment by the same supervisor, complained to NYSE managers. NYSE failed, however, to respond to

that in May 2003, she "complained and protested to BMS the hostile environment and sexual harassment to which she was being subjected, as well as the NYSE's refusal to take any corrective action to remedy that work environment." (Id. ¶ 27.) These complaints were made to "Mike Silvestor of BMS' Human Resources, both orally and in writing." (Id. ¶ 28.) Selmanovic alleges, however, that BMS failed to "take any effective remedial action" in response to her complaints but rather chose "to defer to and support the NYSE, which was a significant client for BMS. . . ." (Id. ¶ 30.) BMS sent a letter to NYSE's Human Resources Department that allegedly "indicated that BMS would consent and accede to whatever actions and decisions were made by the NYSE .

seven years was suddenly taken away from her without justification . . . ." (Id. ¶ 38.) She alleges that BMS joined NYSE in retaliating against her by issuing her an unjustified warning about taking excessive sick days. (Id. ¶ 39.) According to Selmanovic, her supervisor at BMS, Louis Velasquez, acknowledged that her supervisor at NYSE no longer wanted her to work at NYSE. (Id. ¶ 40.) As a result of the continuing hostility she faced at NYSE and because BMS allegedly condoned such conditions, Selmanovic had "no reasonable choice but to consider herself discharged so that she was forced to remove herself from the NYSE's workplace, and from BMS' employ." (Id. ¶¶ 47-48.)

the legal feasibility of the complaint, but does not weigh the evidence that might be offered to support it." Id. (citing AmBase Corp. v. City Investing Co. Liquidating Trust, 326 F.3d 63, 72 (2d Cir. 2003)). The court therefore "must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957)). However, "[d]ocuments that are attached to the complaint or incorporated in it by reference are deemed part of the pleading and may be considered." Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007)

1955, 1965, 167 L.Ed.2d 929 (2007) (internal citations omitted). However, under Rule 8(a)(2), "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Erickson v. Pardus, --- U.S. ---, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007) (per curiam) (citations omitted). Thus, on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), "the bottom-line principle is that 'once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.'" Roth, 489 F.3d at 510 (quoting Bell Atlantic, 127 S.Ct. at 1969).

2. Motion for Summary Judgment Under Fed. R. Civ. 56

"material" if it "might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248.

The Supreme Court has held that Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

As a general rule "the court is to draw all factual inferences in favor of the party against whom summary judgment is sought, viewing the factual assertions . . . in the light most

B. New York City Human Rights Law Claims Against BMS

1. Condonation of Sexual Harassment

BMS contends that the Amended Complaint fails to state a discrimination claim against it under the New York City Human Rights Law and that therefore dismissal is warranted under Fed. R. Civ. P. 12(b)(6). (See Def. Mem. at 6-7.) Under the New York City Human Rights Law, it is unlawful for an

> employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

N.Y.C. Admin. Code § 8-107(1)(a). To establish a prima facie

398 F.3d 211, 216-17 (2d Cir. 2005). Nevertheless, New York State courts have recognized that the "New York City Human Rights Law was intended to be more protective than the state and federal counterpart." Farrugia v. North Shore Univ. Hosp., 13 Misc.3d 740, 747, 820 N.Y.S.2d 718 (Sup. Ct., N.Y. Co. 2006); see also Jordan v. Bates Advertising, Inc., 11 Misc.3d 764, 770, 816 N.Y.S.2d 310 (Sup. Ct., N.Y. Co. 2006) (observing that "in enacting the more protective Human Rights Law, the New York City Council has exercised a clear policy choice which this Court is bound to honor. The Administrative Code's legislative history clearly contemplates that the New York City Human Rights Law be liberally and independently construed with the aim of making it

practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so." N.Y.C. Admin. Code § 8-107(6). Under the aiding and abetting provision of the New York City Human Rights Law, an employer "can only be held liable if it is shown to have encouraged, condoned, or approved of sexual harassment." Heskin v. Insite Advertising, Inc., No. 03 Civ. 2598 (GBD) (AJP), 2005 WL 407646, at *21 (S.D.N.Y. Feb. 22, 2005).[2]

The New York Court of Appeals has explained that "[c]ondonation, which may sufficiently implicate an employer in the discriminatory acts of its employee to constitute a basis for employer liability under the Human Rights Law, contemplates a

Hosp., 66 N.Y.2d 684, 687, 496 N.Y.2d 411 (1985). Moreover, "[a]n employer's calculated inaction in response to discriminatory conduct may, as readily as affirmative conduct, indicate condonation." Id. On the other hand, "[c]ondonation may be disproved by a showing that the employer reasonably investigated a complaint . . . and took corrective action." Father Belle Cmty. Ctr. v. New York State Div. of Human Rights, 221 A.D.2d 44, 53, 642 N.Y.S.2d 739 (App. Div. 4th Dep't 1996), appeal denied, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (N.Y. 1997).

The Amended Complaint avers that Selmanovic notified BMS in 2003 that she was being subjected to sexual harassment and to a hostile environment at NYSE. (Am. Compl. ¶ 27.) She directed

(Id. ¶ 30.) In the face of Selmanovic's complaints, BMS allegedly chose not to take effective action because NYSE was a significant client and BMS did not want to "risk angering or offending" it. (Id. ¶ 34.) The Court finds that the facts alleged in the Amended Complaint are sufficient to support a claim under the New York City Human Rights Law that BMS condoned the sexual harassment to which Selmanovic was subjected by failing to take effective remedial action.

In support of dismissal and summary judgment, BMS argues that it is not liable for condoning sexual harassment because it responded to Selmanovic's complaints by communicating with NYSE on the subject and by offering Selmanovic a transfer to another

concerning these issues.[3] Moreover, at this stage in the proceedings the Parties have not had an opportunity to conduct discovery. Accordingly, BMS' Motion to Dismiss the discrimination claim against it is DENIED. BMS' Motion for Summary Judgment is also DENIED.

2. Retaliation

To establish a prima facie claim of retaliation under the New York City Human Rights Law, a plaintiff must demonstrate that "(1) he participated in a protected activity known to the defendant; (2) the defendant took an employment action that disadvantaged the plaintiff; and (3) that a causal connection exist between the protected activity and the adverse employment

person because such person has . . . opposed any practice forbidden under this chapter." N.Y.C. Admin. Code § 8-107(7). With the Local Civil Rights Restoration Act of 2005, the New York City Council again amended the statute, aiming to "underscore that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes." N.Y.C. Local Law No. 85 of 2005 § 1 (Oct. 3, 2005); see generally Craig Gurian, A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law, 33 FORDHAM URB. L. J. 255, 256 (2006) (noting, for example, that the 2005 Act "amends section 8-130, the construction provision of the City's Human Rights Law, something

reasonably likely to deter a person from engaging in protected activity." N.Y.C. Admin. Code § 8-107(7). Although New York's appellate courts have not yet addressed the 2005 changes to the New York City Human Rights Law, the state's trial courts have opined that the amendments have "enacted a less restrictive standard to trigger a [human rights law] violation in that it is now illegal to retaliate in any manner." Sorrenti v. City of New York, 17 Misc.3d 1102(A), Slip Copy, 2007 WL 2772308 (Table), at *4 (Sup. Ct., N.Y. Co. 2007); see also Farruqia, 13 Misc.3d at 752.

The Amended Complaint alleges that, after Selmanovic complained to BMS about sexual harassment, BMS retaliated against

BMS argues that Selmanovic's retaliation claim under the New York City Human Rights Law should be dismissed because her allegations regarding the locker change and the warning about sick days do not constitute adverse employment actions as a matter of law. (Def. Mem. at 9.) It also argues that Selmanovic has not alleged a sufficient nexus between those actions and her complaint about harassment. (Id.) Finally, BMS contends that Selmanovic was not constructively discharged but, rather, has been granted an indefinite leave of absence. (Id. at 10.) Thus, according to BMS, Selmanovic has "the option to return to work at NYSE or to be assigned to a similar position with identical pay and benefits at another location when she is physically able to

provisions of the New York City Human Rights Law, these allegations are sufficient to state a retaliation claim.[5] As to Selmanovic's allegation that she was constructively discharged by BMS, there is clearly a genuine issue of material fact that cannot be decided at this juncture. Selmanovic asserts that, although she was on unpaid sick leave for a time, she ultimately felt compelled to leave her employment with BMS as a result of the hostile work environment created by NYSE and condoned by BMS. (Selmanovic Aff. ¶¶ 26-29.) BMS, on the other hand, claims that it continues to hold her position open as an accommodation and

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[5] Summary judgment is also not appropriate on these issues at this time. Discovery has not commenced and genuine

"would still, if she requested, return her to work, either at NYSE or at another location, at the same rate of pay and benefits." (Silvestro Aff. ¶ 15.) Accordingly, BMS' Motion to Dismiss the retaliation claim against it and its Motion for Summary Judgment in the alternative are both DENIED.

C. BMS' Motion to Compel Arbitration

BMS moves, also in the alternative, to compel Selmanovic to arbitrate her New York City Human Rights Law claims pursuant to a collective bargaining agreement (the "Agreement") negotiated by her union. BMS refers the Court to excerpts of that Agreement, which is captioned: "2005 Contractors Agreement Between Service

this Agreement." (Id. at 14.) Paragraph 30 of Article XIV provides that employees shall not be discriminated against based on "any characteristic protected" by federal, New York, New Jersey and Connecticut law. (Id. at 95-96.) The provision also states, however, that any claims under such federal and state anti-discrimination statutes "shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations." (Id. at 96.)

BMS asserts that the Agreement, negotiated by the union, governs its employees' "terms and conditions of employment". (Def. Mem. at 5.) It thus contends that Selmanovic, as a member of the union, has waived her right to litigate under the New York

[collective bargaining agreement] that waived plaintiff's right to pursue statutory claims in a judicial forum was unenforceable with respect to plaintiff's claims brought under both federal laws and analogous state and city discrimination laws, drawing no distinction between the statutory source of the rights"). Moreover, there is no basis for the Court to conclude that Selmanovic personally ever waived her right to raise her New York City Human Rights Law claims in a federal forum. Accordingly, BMS' Motion to Compel Arbitration is DENIED.

D. Supplemental Jurisdiction

BMS urges the Court to decline supplemental jurisdiction

provided a compelling reason to decline exercising supplemental jurisdiction over her New York City Human Rights claims. See Selmanovic v. NYSE Group, Inc., 2007 WL 950135, at *6 (S.D.N.Y. Mar. 28, 2007). Plaintiffs were, however, granted leave to replead their New York City Human Rights claims against BMS with greater specificity. Id.

The Court has found that Plaintiffs have now adequately pled their claims against BMS in the Amended Complaint. Unlike the original Complaint, the Amended Complaint also clearly alleges a nexus between NYSE's alleged failure to remedy the discriminatory conduct of its employees and BMS' alleged failure to effectively address Selmanovic's complaints. BMS allegedly condoned the

York City Human Rights Law is DENIED. BMS' Motion for Summary Judgment is DENIED WITHOUT PREJUDICE. BMS' Motion to Compel Arbitration is DENIED. BMS shall answer the Amended Complaint within forty-five (45) days of the date of this Memorandum and Order.

SO ORDERED.

DATED: New York, New York
December 20, 2007

Deborah A. Batts

DEBORAH A. BATTS
United States District Judge